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MICHAEL RODAK, JR.

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-86.

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

BETHLEHEM STEEL CORPORATION,
DEFENDANT, RESPONDENT,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT,

AND

DONALD E. POWERS,
PLAINTIFF, PETITIONER,

v.

McKIE LIGHTER CO., INC.,
DEFENDANT, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

On October 6, 1967, shortly before daybreak, four men, including the plaintiff, all of whom were experienced pile drivers, were getting ready to start their day's work at

Pier 3, Bethlehem Steel Shipyard in East Boston, Massachusetts. (R.A. 253) The plaintiff testified at trial that he classified himself as a pile driver and secured his work from the Pile Drivers and Dock Builders Union.

> "Q The work that you did was classified as a pile driver, is that correct?
>
> "A I classify myself as a pile driver, yes, sir.
>
> "Q You got your work from the pile drivers and dock builders union?
>
> "A Yes, sir." (R.A. 98)

In each of the three counts of his complaint against McKie Lighter Co., Inc., the plaintiff had alleged:

> "On or about October 6, 1967 the plaintiff was . . . a seaman and member of the crew of a lighter."

But his testimony given at trial was:

> "Q Mr. Powers, you were working at Pier 3 on October 6, 1967, is that correct?
>
> "A Yes, sir.
>
> "Q Is it correct to say that at the Pier 3 job, you had no lighter?
>
> "A No, sir, we did not.
>
> "Q You had been working at the Pier 3 job from approximately August through October?
>
> "A Of 1967, yes." (R.A. 92)

Accordingly, the plaintiff testified that there was no lighter and he negated the allegation in the complaint. Before the Pier 3 job started in August, 1967, two months before his injury, he had been working as a pile driver in Harvard Square. (R.A. 93) Before that, he had worked on the construction of the Cambridge Courthouse, the Mer-

chants National Bank Building and the Boston City Hospital. (R.A. 99, 100)

The contract for which the plaintiff was employed described the work to be performed in the following terms:

> ". . . (McKie Lighter) shall provide for but not limited to the installation of concrete jackets on 53 concrete piles . . . consisting of wire brushing of all existing resteel and concrete surfaces coming in contact with the new work, the furnishing and installation of removable steel and concrete forms, the furnishing and placing of all reinforcing steel and concrete, the furnishing and installation of all expansion bolts, wire mesh and other accessories . . . necessary to complete the work. . ."

During his trial testimony, the plaintiff described his work as follows:

> "Q The work you were doing on the piling was cleaning the outside of the piling and then you had to put forms around them, steel forms, you put reinforcing rods inside the steel?
>
> "A That is correct.
>
> "Q And poured concrete inside the forms. Is that correct?
>
> "A Yes, sir.
>
> "Q In order to do that, the pouring of the concrete, you got it by trucks on the top of the pier. It came down by hoses and went inside the forms.
>
> "A That is correct." (R.A. 95)

Two men would normally stand on top of the pier handling the hoses and two men would stand on a narrow float tied under the pier pouring the concrete around the pilings. The pilings under the pier were in rows. The pier

itself was some 30 to 40 feet wide. (R.A. 95, 96) The space between each row of pilings under the pier was called a bay. (R.A. 97)

The work on the piles under the pier was accomplished by standing on a narrow floating stage or raft tied under the pier. The one in use at the time of the plaintiff's injury was 4 feet wide, some 25 feet long, and composed of four timbers secured together. (R.A. 30, 304, 305) The plaintiff testified that it,

> ". . . was 3 1/2 to 4 feet wide. This was on 10 x 10, 12 x 12 timbers bonded together."

The co-worker nearest the plaintiff, called by the plaintiff as a witness, testified at R.A. 305:

> "Q Three or four feet wide?
> "A Yes, that is right."

The lines from the pier were tied to the raft at all times. (R.A. 99) The plaintiff testified (R.A. 99) concerning the lines between the pier and the raft:

> "Q It was either tied to the raft or tied to the pier at all times?
> "A It was tied to the raft at all times."

The floating stage was used as a work surface by the men under the pier repairing the pilings according to the plaintiff's testimony in deposition, at trial (R.A. 97, 98):

> "I call your attention to your deposition, particularly the bottom of page 16:
>
> 'Q Were you attempting to move the raft along, parallel to the face of the pier?'
>
> "You answered:

'A Well, they were alongside the pier when we started work. And then the foreman would designate a bay he wanted to work in and then we would move them alongside and then nose them into the bay.'

"Q 'Q You mean pull them alongside that way and then turn them in that way?

"A Pulled it by lines, yes.

"Q 'Q And then these rafts were just work surfaces?

'A Wooden rafts, right.

'Q But, I mean, they were used as your work surface so you could work on the piles?'

"You answered: 'Yes'.

"That is true, isn't it?

"A That is right sir."

The distance that the raft would be moved to start work on the piles under the pier would be some 10 to 20 feet. (R.A. 98) Thus at R.A. 98 the plaintiff testified:

"Q And that distance you would move them would be anywhere from 10, 15, 20 feet?

"A It would vary depending upon where the foreman would designate an area where you had to work."

On the particular morning the distance the raft was to be moved was described by the plaintiff as 15 or 20 feet. Thus at R.A. 96 the plaintiff testified:

"Q What was the distance the raft was going to move on the morning of October 6?

"A It would be pretty hard to say.

"Q Would you say about 15, 20 feet?

"A It could be in that area, yes, sir, on that particular morning."

On the morning of October 6, 1967 the pile drivers placed a pair of lights on the side of the pier with bulbs at several foot intervals. (R.A. 309, 310) While the plaintiff was standing on the four-foot wide work float tied to the pier, the light up on the pier which was nearest him and some 10 to 12 feet over his head, suddenly "popped" and a particle of the bulb caused his eye injury. (R.A. 114) There was no evidence that anything struck the bulb, or concerning any impact from any source, and no witness knew why the bulb had broken. (R.A. 45, 114, 286, 287, 307, 257, 258) The men were provided with three types of eye shields: hoods to wear during standblasting, dark eye shields to wear during welding or burning, and clear glass eye shields to wear at any time including chipping work. The decision when to wear the goggles was an individual one. (R.A. 121, 122) The plaintiff testified he saw no reason to wear goggles at the time of his injury (R.A. 122), but he had them with him at that time. (R.A. 122, 154).

> "Q You did have goggles with you when working over there?
>
> "A Yes, sir.
>
> "Q You did not use them when working on the morning of October 6, 1967?
>
> "A There was complete darkness, no need of goggles at that particular time.
>
> "Q There was a light on, the light you have been talking about.
>
> "A There was a light on, yes, sir." (R.A. 122)

On December 29, 1969, three months after he had started the present suit in which he alleged he was,

> "a seaman and member of the crew of a lighter",

(and in which his testimony at trial confirmed there was no lighter, R.A. 92) the plaintiff testified under oath on the witness stand at a formal Compensation Hearing, in the presence of his counsel, that he was a pile driver.

"Q Did you tell the Compensation Commissioner you were always classified as a pile driver?

"A Yes, sir, I did.

"Q You did that on December 29 in order to receive compensation as a harbor worker.

"A Yes." (R.A. 105)

The plaintiff also received and accepted the benefits of the Compensation Statute. (R.A. 105) Section 903 of that Statute (Title 33 U.S.C.) excludes,

"a member of the crew of any vessel"

from its benefits. Section 905 makes it the employee's exclusive remedy against his employer.

Questions Presented.

1. Whether the District Court and Court of Appeals correctly ruled that a work float consisting of four one-foot timbers used as a work surface by a pile driver while pouring concrete around the old piles under a pier to repair them, being at all times tied to the pier, was not a vessel and was not used in "traditional maritime activities, involving navigation or commerce on navigable waters."[1]

2. Whether the District Court and Court of Appeals correctly ruled that a self-styled "pile driver", a member of the Pile Drivers Union, whose work was to install steel forms under a repair yard pier and pour concrete into those forms by a hose from a delivery truck on the pier,

[1] *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249, 256 (1972)

while standing on a narrow work float, four feet wide, always tied to the pier, does not have a nexus with "traditional maritime activities, involving navigation or commerce on navigable waters"[2] and was not a member of the crew of a vessel.

Summary of Argument.

The decision of the Court of Appeals for the First Circuit is completely in accord with, and expressly follows the very recent opinion of this Honorable Court in the *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, (1972). That decision was issued several weeks before the oral argument in the case at bar; it was considered by the parties and the Court of Appeals on oral argument and expressly followed by the Court of Appeals in its Opinion. The standards required for admiralty jurisdiction and other legal principles applicable to the case at bar were fully described by this Honorable Court in the *Executive Jet Aviation* opinion. The decision of the Court of Appeals cites and follows that opinion and is not in any respect in conflict with that opinion. The decision of the Court of Appeals is also in complete accord with the opinions of other Courts of Appeal and with other District Courts including all cases cited in the Petition.

In the 1972 opinion in *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, the Supreme Court noted that with respect to admiralty jurisdiction a mechanical or locus standard has been "actively criticized" and recognized as the more appropriate basis,

> "... traditional maritime activities, involving navigation or commerce on navigable waters." (At page 256)

[2] *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, 256 (1972)

In the case at bar there has been no navigation or commerce on navigable waters. The plaintiff by his own testimony and by his own witnesses classified himself as a pile driver, obtained all his work from the Pile Drivers Union and before starting on the job for the defendant, McKie, a few months earlier, had been engaged as a pile driver in the construction of a bank, a courthouse, and a hospital, all inside the City of Boston. The work he was performing at the time of his injury was to repair old piles under a pier by pouring concrete into steel forms around the old piles by a hose which was attached to a cement delivery truck on top of the pier. To perform the repairs of the old piles he stood on a narrow work float four feet wide, made of four one-foot timbers secured together, and some 25 feet long. He testified it was at all times tied to the pier. It was moved only to reach the pile to be repaired on the particular day or approximately 10 to 20 feet each morning. It was entirely localized work under the pier repairing the piles and in no sense concerned,

> "... traditional maritime activities, involving navigation or commerce on navigable waters." (Page 256, *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972).)

Each case cited in the Petition has been analyzed in detail in the Respondents' Brief and the absence of any materiality has been shown from the facts of each case. For purposes of illustration in this summary, reference is made to two cases, each of which was cited three times in the Petition. In *Grimes* v *Raymond Concrete Pile Co.,* 356 U.S. 252 (1958), cited at pages 10, 14 and 17 of the Petition, the plaintiff was working 110 miles out in the ocean and was transferring from a tug, on which he ate and slept, in a breeches buoy in heavy weather to a so-called Texas

tower when the rough seas threw him against the pilot house of the tugboat causing his injury. Yet the Petition says on page 10 that Grimes was a person

"performing the same work as the plaintiff",

and on page 17 the Petition refers to the *Grimes* case as,

"similar evidence."

The present plaintiff was a pile driver who stood on a float four feet wide made of timbers tied together underneath a pier so that he might pour concrete, from a delivery truck up on top of the pier, into steel forms around the old piles while the float was at all times tied to the pier and once a day moved 10 or 20 feet.

The Petition cites on three occasions the case of *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 374 (5th Cir. 1961), at pages 9, 14 and 17. Stanley was working 40 miles out in the Gulf of Mexico and was transferring from a tug to an oil drilling tower in rough weather when the roll of the vessel in the heavy seas caused his injury while he was attempting to leave the tug. Yet at page 9, the Petition contends that the *Stanley* case is one of

"similar facts",

to that of the present plaintiff who was a self-styled pile driver pouring concrete into forms around old piles underneath a pier on a narrow work float four feet wide which was always tied to the pier and was merely used to stand on in order to perform the work of repairing the old piles.

The decision below additionally parallels the following language in the case of *Evansville & Bowling Green Packet Co* v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), in which the Supreme Court rejected any admiralty jurisdiction or status of a vessel for a wharf float saying at page 21:

> "It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters. . . The wharf boat was used to transfer freight between steamboats and land and from one steamboat to another. . . Charges made for services performed by its use were for storage and handling and not for transportation. . . It was not practically capable of being used as a means of transportation. . . It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

A factual analysis of all of the cases cited in the Petition confirms that the decision of the Court of Appeals in the case at bar is entirely in accord with all of the cases cited by the Petitioner and is in accord as well with the recent and controlling decision of this Honorable Court in the case of *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972).

Because none of the considerations required by Rule 19 of the United States Supreme Court are supported by the Petition in the case at bar, the Respondents respectfully submit that the Petition should be denied.

Argument.

I. No Conflict Exists with the Decision of another Court of Appeals.

No question exists that the raft being used as a work float in the openings (called bays) under the pier to repair the pilings was "3 1/2 to 4 feet wide", composed of

"timbers bonded together" with "no deck or surface around it". (R.A. 30)

The witness Ward called by the plaintiff, and who was the pile driver standing beside the plaintiff, testified as follows concerning the width of the raft or work float on which he and the plaintiff were standing:

> "Q The narrow one about three feet wide, is that right?
>
> "A Yes.
>
> "Q Three or four feet wide?
>
> "A Yes, that is right.
>
> "Q So there would be no difficulty in getting this narrow raft in between the pilings into the bay, is that right?
>
> "A No, there never was much difficulty getting either one in between the bays." (R.A. 305)

The plaintiff himself described the raft as follows:

> ". . . it was 3 1/2 to 4 feet wide. This was on 12 x 12, 10 x 10 timbers bonded together. There was no deck or surface around it. . ." (R.A. 30, 304, 305)

No question exists that it was "tied to the pier at all times" and that it moved "10, 15 or 20 feet" depending upon the particular pilings being repaired.

The cases cited by the Petitioner at pages 8 and 9 of the Petition are clearly consistent with the decisions of the District Court and Court of Appeals in the case at bar.

Kenny v *New York*, 108 F2d 958 (2nd Cir. 1940), concerned a "deck scow" named "The Columbiad". It was large enough to have been the subject of a bare boat charter. Further details concerning the deck scow are found in the District Court opinion at 28 F. Supp. 175. The District Court notes that it was moored by anchors in the

tideway and sustained the damage during a storm because she had been improperly anchored. It was large enough to have accommodated several large fireworks display pieces, having in mind the required spacing between such pieces. At page 959 the Circuit Court of Appeals noted it was "capable of navigation at all times".

United States v *Moran Towing & Transportation Co.*, 374 F2d 656 (4th Cir. 1967) concerns a 9400-ton floating drydock which was 360 feet long and 100 feet wide. It was being towed to sea for intentional sinking in the ocean depth when it foundered and sank, blocking the channel. The sole issue before the Court was the applicability of the so-called Wreck Statute under which the United States Corps of Army Engineers were seeking to recover some $163,000 as the cost of removal of the sunken wreck as a menace to navigation in the channel. The Court noted that the explicit language of the Wreck Statute (33 U.S.C. § 414, Sect. 19) applied to any,

> "sunken vessel, boat, watercraft, raft or other similar obstruction."

The significant characteristics therefore were the effect of the sunken object to serve as an underwater obstruction in its sunken condition. It is plainly without materiality to the issues in the case at hand. It may also be noted from the standpoint of statutory construction that Congress saw fit to include the word "raft" as a later word in a sequence which earlier had included the word "vessel". By normal rules of statutory construction the text of that Statute would indicate an intention by Congress to differentiate between a vessel and a raft. The Petitioner, however, purports to cite the case as authority for the opposite conclusion, stating it on page 8 as a case,

> "where rafts were held to be vessels".

There was no raft in the case, but only a sunken wreck of a former drydock. Neither the deck scow in the *Kenny* case nor the 9400-ton sunken drydock in the *Moran* case are material to the case at bar or to the purpose for which they are cited by the Petitioner.

Peck v *U. S. Steel Corp.*, 315 F. Supp. 905 (Minn.), affirmed 446 F2d 891 (8th Cir. 1970), concerned a large derrick barge, named the S2, which was large enough and powerful enough to have lifted a tugboat entirely out of the water. The suit concerned injury to the tug when it was being lifted out of the water by the derrick barge. To cite that case as an illustration of a case "where rafts were held to be vessels" is plainly unsound.

Nor is the case of *Cook* v *Belden Concrete Products, Inc.*, 472 F2d 999 (5th Cir. 1973), an illustration of a case where a "raft-like object was not a vessel." The *Cook* case concerned a former barge transformed into a functioning drydock used for the launching of other newly constructed barges. It relates to a specialized line of cases which have treated the subject of floating drydocks. There is no reference anywhere in the opinion to any "raft-like object" nor is there any dry dock in the case at bar.

II. No Conflict Exists between the Decision of the District Court and the Court of Appeals in the Present Case, and Any District Court Opinion.

Nor is there any merit in the suggestion in the Petition concerning a conflict or indeed confusion at the District Court level. None of the cases cited is material to the present case.

United States v *One Raft of Timber*, 13 F. 796 (S.C. 1882), concerned a raft of lumber for moving a quantity of lumber to market. It was large enough to have been navigated by sail and when anchored without lights in the

navigating channel caused a self-evident hazard to navigation. The issue before the Court was the applicability of a Statute which required navigating lights on coal boats, trading boats, rafts or other water craft. The case does not present any holding that a raft is a vessel since the Statute expressly refers to rafts as part of its sequence. In the particular instance the raft was of such size that it was actually being navigated and presented a navigational hazard to other vessels in the channel when unlighted.

In *Muntz* v *A Raft of Timber*, 15 F. 555 (E.D. La. 1883), the raft was used as a means of transporting an amount of lumber down the Mississippi River and was of such size that when it got away during a storm, it took two large and one small tugboats to manage it. It has no materiality to the pouring of concrete into a form around a piling under a pier from a hose leading from a concrete delivery truck while standing on a narrow work float always tied to the pier. It is of particular interest that the Court in the *Muntz* case made the following comment at page 557:

> "The decision in this case need not be taken as holding that a raft is a vehicle of navigation or can commit a maritime tort or as being subject to any other obligations or responsibilities than a bale of cotton would be subject to under the same circumstances."

In *Seabrook* v *Raft of Railroad Ties*, 40 F. 596 (S.C. 1889), the raft of lumber was 150 feet square and it caused collision damage to a large steam dredge while traveling down the Stone River. The 150-foot raft had first traveled down the Edisto River and then other navigable rivers and then finally to the Stone River where the collision occurred. It was characterized by the Court as a "voyage of many days duration". Further, that

"it was manned with a pilot who was in command, a crew of four men and a cook".

The Court also stated at page 598 that,

"Necessarily it was constructed to withstand the buffeting of the waves and wind . . ."

Charles Barnes Co. v *One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909), concerned the mortgage of a

"pump boat, its machinery, sails, furniture and apparel".

It was described by the libellant as having

"a scow bow, a scow stern, a deck fore and a deck aft, and a cockpit in the center covered by a cargo bow".

The Court noted it was

"capable of being towed to any place in the Ohio River where its services might be needed".

Accordingly, it functioned as a vessel in activity as well as in its characterization in the mortgage.

In the case of *Tregoning Boat Co.* v *United States*, 15 Cust. Ct. 196, C. O. 971 (1945), a case in the Court of Customs, concerned the classification for custom duties of a lifeboat fitted with sails, a rudder, food, water and signalling equipment. It was designed to accommodate 12 persons and save them during a storm at sea. No reasonable relation to the present work stage tied under the pier can be made.

There is no factual and no legal relationship between any of the foregoing cases and the case at hand. Not only is it clear that the plaintiff's work was that of a pile driver pouring concrete around steel forms under a pier, while

standing on a work float 4′ x 1′ x 25′ used only to stand on while it was always tied to the pier, but his work was clearly not that of a seaman as defined in the case of *Carumbo* v *Cape Cod Steamship Company,* 123 F2d 991 (1st Cir. 1941). That definition was quoted and followed by the Supreme Court in *Swanson* v *Marra,* 328 U.S. 1, 5 (1945) and was cited in the Opinion of the District Court in the present case. (R.A. 371) The *Carumbo* decision at page 995 reads as follows:

> "The requirements that the ship be in navigation; that there be more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appears to us to be the essential and decisive elements of the definition of a 'member of a crew'."

All three of the requirements must be met. Since the plaintiff was working on a floating stage under a pier which was always tied by lines to the pier he fails the first of the three requirements, i.e.,

> "that the ship be in navigation".

The Supreme Court used as its comparable phrase,

> "encounter perils of navigation to which craft used for transportation are exposed",

which appears at page 21 in *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.,* 271 U.S. 19 (1926).

Secondly, it is clear that he had no

> "more or less permanent connection with the ship",

since his only relationship to the staging was to stand on it while he was repairing the piles. (R.A. 97, 98)

The third requirement, that the seaman be aboard primarily to aid in navigation, is plainly deficient since the plaintiff primarily and indeed exclusively was working on the repair of pilings under the pier.

The phrase,

"primarily to aid in navigation",

has been construed to include the specialized mission of the vessel as a vessel. Thus, although an oiler or wiper in the engine room would not be directly aiding in navigation, he would be plainly a member of the crew since he is aiding in transporting the vessel over the sea. Similarly on a passenger vessel where entertainment of the passengers was part of the mission of the voyage an orchestra player would be included as a member of the crew for such a voyage. But if the only function of a floating stage is to be essentially at rest under a pier, no one can be regarded as on board "primarily" to aid in its navigation since no navigation is intended or performed. The primary and only performance is that of cleaning and repairing piles driven into the ground under a pier only 40 feet wide while standing on a stage float permanently tied to that pier.

Evansville & Bowling Green Packet Co. v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926)
Thibodeaux v *J. Ray McDermott & Co.*, (5th Cir. 1960) 276 F2d 42.

Nor does any relationship or any conflict exist between the following District Court cases cited by the Petition at page 8 and the case at bar:

Raft of Cypress Logs, Fed. Cas. No. 11,527 (W.D. Tenn. 1882), concerned the navigation of a large commercial raft of cypress logs on a voyage of several hundred miles from New Madrid, Missouri to Memphis, Tennessee to reach the

lumber markets. The case concerned the wages of the sailing crew during that lengthy voyage and is plainly a non-material situation to the present case.

Moores v *Louisville Underwriters,* 14 F. 226 (W.D. Tenn. 1882), concerned the interpretation of a cargo insurance policy applied to a lumber raft towed astern of a Mississippi steamboat for purposes of transporting the lumber to the lumber market. It was large enough to have a barge towed astern of it. It is patently extraneous to the present case both in its factual circumstances and its legal issues.

Berton v *Tietjen & Lang Dry Dock Co.,* 219 F. 763 (N.J. 1915), concerned a floating dry dock and its characterization at the bottom of page 8 of the Petition as a "raft-like object" is wholly unsound. The case follows a long line of specialized cases relating to floating dry docks which held them not to be vessels. There is no suggestion anywhere that a floating dry dock was in any manner concerned in the present case.

The references at the top of page 9 of the Petition to

> "other appellate decisions . . . under similar facts"

is not supported by the cases which follow since none of them has facts which are in any respect similar to the case at bar.

In *Stafford* v *Perini Corporation,* 475 F2d 507 (1st Cir. 1973), the plaintiff was injured while working on the deck of a large ocean going scow two miles at sea in the waters of Narragansett Bay.

In *Biggs* v *Norfolk Dredging Company,* 360 F2d 360 (4th Cir. 1965), the plaintiff was characterized by the Court in the following language at page 362:

> "Biggs, who held a Coast Guard certificate as a seaman, had on occasion handled the lines and assisted in maneuvering the barges."

Moreover, at the time of his injury, Biggs was standing on a derrick barge and had just stepped onto the derrick barge from a pontoon barge. There were several other barges there which the plaintiff also maneuvered. There is no suggestion anywhere in the present record that the present plaintiff had any certificates as a seaman, nor was there either any derrick barge, nor was there any barge of any kind in use at the Pier 3 job where he was employed at the time of his injury.

In *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 375 (5th Cir. 1961), cited by the Petitioner at page 14 of the Petition, the plaintiff was some 40 miles out in the Gulf of Mexico and was swinging from a tug to board a drilling tower. The plaintiff ate, slept and bathed on a tugboat which serviced the tower and worked on the tower itself. The maritime quality of his work is evidenced by the fact that the roughness of the sea was the immediate cause of his injury. At page 376 the Court states:

> "Just as Stanley was about to swing, a large wave lifted the boat up. Stanley was thrown off balance. He swung out, clutching the rope, and banged into a steel ladder on the platform."

The case is clearly no material or reasonable precedent for a pile driver repairing fixed piles underneath a 40-foot pier, on a narrow float staging tied at all times to or under that pier.

In *United States* v *Bruce Dry Dock Co.*, 65 F2d 938 (5th Cir. 1933) and *The Bart Tully*, 251 F. 856 (6th Cir. 1918), the Courts were confronted with the procedural problems which have since been cured by the enactment first of the Federal Tort Claims Act, 28 U.S.C. § 1291, et seq., and second by the Extension of Admiralty Jurisdiction Statute, 62 Stat. 496, 46 U.S.C. § 740. In each case a collision had

occurred between a vessel and a land unit under circumstances which would have afforded admiralty jurisdiction to the vessel but not to the owner of the dry dock in one instance, or to the wharf in the other. Since both cases would lie within the statutory extension of admiralty jurisdiction, the cases are without current authoritative application except to point to the reasonableness of the Statutes which have now been enacted to meet the exigencies suggested by the cases cited.

None of the cases cited by the Petitioner as grounds for consideration for review on certiorari is material to the case at bar, nor do they present any conflict with the case at bar. They do not reasonably support the granting of certiorari by this Honorable Court.

III. No Important Question of Federal Law is Presented by the Present Case.

With so recent and searching a review by the Supreme Court concerning the standards of admiralty jurisdiction as *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972), it is especially clear that no further review in that identical field warrants the exercise of this Court's discretion in granting certiorari. A significant summary of the law applicable to the case at bar with respect to maritime jurisdiction appears at page 261 of that decision in the following text:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

This opinion was expressly followed by the Court of Appeals in the case at bar. Whether the local nature of the plaintiff's work pouring concrete around fixed piles under a pier from a delivery truck overhead is the controlling standard, or whether the essentially stationary narrow work float, always tied to or under the pier as a working surface to perform that fixed local work, is the standard, there is a complete absence of any

> "maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters." Page 256, *Executive Jet Aviation* v *City of Cleveland,* 409 U.S. 249.

Here, the plaintiff was working on or under a pier and using a small, crude work float merely to stand on to perform his work as a pile driver. It is a contrived absurdity for the Petition to refer (as it does at page 5 thereof) to

> "navigating" or "transport".

The "transport" and "navigating" was a distance of 10 or 20 feet while always tied to the pier and the positioning was convenience in performing the work of pouring concrete around the old pilings underneath the pier. The propriety of the decision by the Court of Appeals especially guided by the scholarly and thorough direction in the current opinion of this Court in *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249, wholly refutes any ground for this Court's discretion in granting certiorari in the present case.

In *Hark* v *Antilles Air Boats, Inc.,* 41 U.S.L.W. 2506-07 (V.I. 1973), an injury occurred at a considerable distance off shore in a seaplane which was, as the Court pointed out, used as a mobile vessel. After the plane had moved at high

speed over the water for takeoff and had barely become airborne, the damage occurred. There is plainly no analogy or materiality between the present case and the operation of seaplanes at high speed, either before take off or after take off, for a several hundred mile run between two islands in the Caribbean in the Virgin Islands group.

IV. The Decision does Not Conflict with Any Applicable Decision of the United States Supreme Court.

The Petitioner cites at pages 9 and 10 of the Petition the following three cases as illustrations of a ruling "that a raft similar to the one at bar may be a vessel". An examination of the facts of the cases, however, does not support this contention.

In *Knapp, Stout & Co.* v *McCaffrey,* 177 U.S. 638 (1899), the Supreme Court ruled that a Bill in Equity in the State Court of Illinois was a proper remedy for enforcing a possessory lien against a raft of lumber for towage services from Stillwater, Minnesota to St. Louis, Missouri provided to other rafts of lumber. The Court noted that it was not an action in rem against the raft as a res and therefore not intended to be an admiralty action. The non-admiralty jurisdiction of the Illinois Court was sustained.

New Bedford Dry Dock v *Purdy,* 258 U.S. 96 (1922), concerned a 200-foot long car float which had "steering apparatus and a steam plant of the propeller type for propulsion". It was plainly incorrect for the Petitioner at page 9 to refer to the case as "a raft similar to the one at bar".

The third case, *Nogueira* v *New York, N.H. & H.R.R.,* 281 U.S. 128 (1930), concerned another car float, this time described as being of 500 tons' dimension Not only was its size sufficient for transferring heavy railroad cars across wide areas such as New York harbor, but its freeboard and

decking were also designed for similar maritime commercial transportation. It plainly has no application to the case at bar and it is completely unsound to refer to it as " a raft similar to the one at bar".

Nor is it correct to refer to the plaintiff in the case of *Grimes* v *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), as

> "performing the same work as the plaintiff performed herein".

The plaintiff Grimes was 110 miles at sea, being transferred in a breeches buoy from a rolling tugboat in heavy weather to a sea based so-called Texas tower when the rolling of the sea caused him to be thrown against part of the structure. It is completely unsound to characterize circumstances of such an injury with the present plaintiff pouring concrete into steel forms underneath the pier from a hose attached to a truck on the surface of the pier while standing on a work float some four feet wide, which was moved 15 or 20 feet each day in accordance with the location of the particular piles being repaired under the pier.

None of the citations presented by the Petition is material to the case at bar and no proper ground for the granting of certiorari has been presented by the Petitioner therefrom.

V. No Case has been Cited in the Petitioner's Argument which is Material to the Case at Bar.

The Petition makes initial reference to the definition used to describe a vessel by Messrs. Gilmore & Black in their text, *The Law of Admiralty*, (1957) at page 30 reading:

> ". . . floating structures capable of transporting something over water."

The authors applied footnote No. 105 on page 30 to that quoted definition citing first the case of *Pleason* v *Gulfport Shipbuilding Corporation*, 221 F2d 621 (5th Cir. 1955). That case is also cited by the Petitioner.

The vessel in the *Pleason* case to which the above phrase was applied was called the "Carol Ann". It was 183 feet long with a 32-foot beam and a 20-foot depth. It was built in 1943 as a salvage vessel for the United States Navy. It was of wood and steel with 1,500 gross tons burden. It had earlier made voyages to Honduras and had crossed the Gulf of Mexico. In the case at bar, a work float was always tied to the pier and merely positioned for the day's work by lines which were always tied to the 40-foot wide pier. The pilings were being cleaned and then re-strengthened by placing an additional thickness of cement around the steel reinforcement. The sole purpose was to provide a work stage for workmen repairing the pilings under the pier. Thus, at page 91 of the transcript when the plaintiff was asked to testify in confirmation of his earlier deposition, the record states:

"Q 'Q You men pull them alongside that way and then turn them in that way?'

"A Pulled it by lines, yes.

"Q 'Q And then these rafts were just work surfaces?

'A Wooden rafts, right.

'Q But, I mean, they were used as your work surfaces so you could work on the piles?'

"You answered: 'Yes.' That is true, isn't it?

"A That is right, sir." (R.A. 97, 98)

Footnote No. 105 at page 30 in *The Law of Admiralty*, after citing the *Pleason* case, then cites two additional cases to illustrate what is *not* a vessel, and one additional case

to illustrate what *is* a vessel. The latter case, illustrating what *is* a vessel, is *Kenny* v *The City of New York* (CA 2 1940) 108 F2d 958. The vessel in that case was a deck scow under bare boat charter at the rate of some $300 a month and named the "Columbiad". Its dimensions are not given but it was used for a public fireworks display and one may reasonably infer a length in excess of 200 feet, having in mind the necessity for open spacing between large fireworks display pieces so that each can be lighted successively.

The two cases cited by Gilmore & Black to illustrate what is *not* a vessel provide strong confirmation of the ruling by the District Court and Court of Appeals in the present case. The cases are *Cope* v *Vallette Dry Dock Co.*, 119 U.S. 625, and *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926). In the *Bowling Green Packet* case, the United States Supreme Court denied the status of a vessel to a barge 223 feet long, 48 feet wide with a 6-foot depth. It had earlier made trips up and down the Mississippi River. At the time of the incident concerned in the litigation it was tied to a pier as a "wharf boat" and moved only short distances each day to accommodate itself to the currents in the river. At page 21, the Supreme Court cited a number of circumstances negating the status of a vessel stating:

> "It had no machinery or power for propulsion and was not subject to government inspection as are vessels operated on navigable waters. . . The wharf boat was used to transfer freight between steamboats and land and from one steamboat to another. . . Charges made for services performed by its use were for storage and handling and not for transportation . . . It was not practically capable of being used as a means of transportation . . . It performed no function that might not have been performed as well by an appropriate struc-

ture on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

The reference by the Supreme Court to "a floating stage or platform permanently attached to the land" coincides perfectly with the work platform tied to the pier in the present case. The plaintiff himself described the line from the pier as,

"It was tied to the raft at all times." (R.A. 99)

If the work boat in the *Bowling Green Packet* case was not "practically capable of being used as a means of transportation" although it was 243 feet long, 48 feet wide and 6 feet deep, then far more impractical would be any means of transportation from these lashed floating timbers held together temporarily by rope. They were clearly suitable for the purpose for which they were being used, namely, as a floating stage for pile drivers working under a 40-foot pier to which it was at all times secured as was the wharf boat.

The second case cited by Gilmore & Black in footnote 105 is *Cope* v *Vallette Dry Dock Co.*, 119 U.S. 625 (1887). In that case the Court ruled that a floating dry dock was not a vessel and gave its reasons in the following detail at page 627:

"They describe the dry dock as a structure contrived for the purpose of taking ships out of the water, in order to repair them, and for no other purpose. They state that it consisted of a large oblong box with a flat bottom and perpendicular sides; that in the year 1866 it had been put in position by being permanently

moored by means of large chains to the right, or Algiers, bank of the Mississippi River, and was sparred off from the bank by means of spars, to keep it afloat. When it was desired to dock a steamboat or other vessel, it was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam, or otherwise. It was not designed for navigation, and could not be practically used therefor."

Whatever the source of the definition, whether the Statutes of the United States as in 1 U.S.C. § 3, 19 U.S.C. § 1401(a), 46 U.S.C. § 801, or in Volume 7A of Professor Moore's treatise on Federal Practice, (2nd Ed. 1972) paragraph .215(2) et seq, the connotation of transportation by water in terms of commerce and navigation is inherent throughout. They are also consistent with the comment of the Supreme Court at page 256 in the case of *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972) reading:

> "Other Courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within Federal admiralty jurisdiction, but that there must also be a maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters."

In addition to citing the cases already considered, the Petitioner at page 11 also cites the following cases whose

s make it clear that they are without any materiality to case at bar.

n *Offshore Company* v *Robinson,* 266 F2d 769 (5th Cir. 9), the plaintiff was a regular member of the drilling w serving on a barge 200 feet long, 104 feet wide, and feet deep used as a mobile drilling platform in the Gulf Mexico. At page 772 the Court stated:

"It has no engines and is moved by tugs from one well located in the Gulf to another. It has living quarters for the crew and a galley in a two-story house on top of the deck. Six life rafts are carried, each capable of holding 10 men. Regular abandon ship drills were held aboard Offshore No. 55. Its life-saving gear was approved by the Coast Guard."

he case is entirely different from that of the present intiff whose work as a pile driver was under a pier on a k float as a platform to pour concrete into steel forms m a hose leading from a truck up on the pier.

n *Colby* v *Todd Packing Co.,* 77 F. Supp. 956 (Alaska 8), the Court pointed out that salvage could properly against either a vessel or its cargo or any object at sea h value. It quoted at page 958, from an earlier case of *ltby* v *Steam Derrick Boat,* 16 Fed. Cases, 564, which ed in part:

"It has long been held that property, whether it has been an actual instrument or subject of commerce or not, may be the subject of salvage."

n short, there are many instances where bales of wool ther items of cargo have been the subject of salvage. re is no holding whatever in the case that the fish trap ribs of logs were in any sense a vessel. In accord with

that view is the comment in Messrs. Gilmore & Black's text, *The Law of Admiralty,* at the end of footnote 105 on page 30 concerning the salvable qualities of an airplane where the authors point out that salvage is not dependent upon the status as a vessel, by saying:

> "In any case a decision that an airplane may be the subject of salvage need not imply that it is a 'vessel'."

In *Spiller* v *Thomas M. Lowe, Jr. & Associates, Inc.*, 328 F. Supp. 54 (Ark. 1971), the vessel was one of a fleet of six 16-foot boats being used by a mapping and survey party to travel a 206-mile segment of the Red River, that is, from mile 230 to mile 436 of that river. At page 57, the Court comments as follows:

> "The manufacturer's rating for the boat in question was as follows: This boat is built to accommodate under normal conditions an outboard motor of not more than 35 OBC certified horsepower and five persons at 150 pounds per person or a properly located maximum weight of 1,080 pounds for persons, motor and gear."

In *Guilbeau* v *Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (La. 1963), the vessel was 260 feet long and 52 feet wide fitted with sleeping quarters and a galley for the crew. It was moved from various places in inland waters by tugboat and at the time of the injury had been towed to a location in a navigable river.

None of the foregoing cases is material or comparable to the case at bar, of a work platform four feet wide, which was always tied to a pier and used for standing to pour concrete into forms around fixed pilings under a pier. The Petition next cites at page 12 two cases which effectively illustrate the caliber of transportation contemplated by the

definition. Thus in *The General Cass,* Fed. Cas. No. 5307, P. 170 (E.D. Mich. 1871), the Court considered a lumber scow used for carrying loads of lumber across the shoals in the Saginaw River over which the larger vessels were unable to pass safely. In describing the commerce in which the lumber scow was engaged, the Court stated at page 170:

> "The lumber of the Saginaw valley, as an article of commerce, passing down and out of the Saginaw river, on its way to the lumber marts of other states and countries, constitutes one of the greatest interests of its kind in the world, and in its transportation employs vessels of all sizes, forms and capacities, and all kinds of propelling power, from the insignificant scow, like the one here in question, to the largest sized vessels and steamers that float the lakes. The business and employment of each, irrespective of the accidents of size, form, capacity or propelling power, appertains equally to trade and commerce, and all therefore equally subject to the jurisdiction of this court."

The static function of the present plaintiff standing on a four foot work float, always tied to or under the pier, in order to repair the pilings under the pier, is completely opposite to the commerce described in the foregoing case. The work float was kept on the outside of the pier after hours and moved into the bays under it to work on the piles, a distance of some 10 to 20 feet, and yet the Petitioner at page 12 characterizes this action as "repeatedly used to transport men and equipment over navigable waters".

In *The Pioneer,* 30 F. 206 (E.D. N.Y. 1886), a dredge, large enough to carry a steam-operated shovel and bucket for digging navigable channels, was concerned. It is in no sense a precedent for a three and one-half to four foot work

float which was always tied to or under the pier in order that pile drivers might pour concrete into forms around the piles underneath the pier and which they moved every morning some 10 to 20 feet to start their work.

Although the Petitioner purports to suggest that the vessel in *Brinegar* v *Iron Ore Construction Company*, 302 F. Supp. 630 (E.D. Ark. 1969), was a makeshift pontoon oil carrier, the facts in the case indicate that the vessel was capable of carrying a thousand gallons of fuel and it also had sufficient power to tow a large dredge, and also to tow several barges on the Arkansas River. Further, because of her ability to transport a thousand gallons, she was subject to the provisions of Title 46, U.S.C. § 391(a), which required that she be in command of a licensed master, and her manning requirements required the approval and inspection of the United States Coast Guard. The case is completely without materiality to the present instance of a four-foot work float tied underneath the pier in order that pile drivers could stand on it to pour concrete around the piles under the pier.

Finally, the Petitioner refers to the case of *Braniff* v *Jackson Ave.-Gretna Ferry, Inc.*, 280 F2d 523, (5th Cir. 1960). A printing error in the Petition refers to "Gretna Terry, Inc." instead of the correct name, "Gretna Ferry, Inc.". As that key word "Ferry" indicates, the case concerns a large ferry boat traveling down the Mississippi River, and while so traveling a work tender was put over the side, attached to the ferry and traveling with it, in order to make some mechanical repairs while underway. The tender capsized while being handled by the crewmembers of the ferry. The case has no relation to the facts of the present case in which the plaintiff was performing a stationary land-based task of pouring concrete around piles under a pier while standing on a four-foot work float which was always tied to the pier, and which moved some 10 to

20 feet solely for the purpose of positioning it beside the particular pile to be worked on. In sum, none of the cases cited in the Petition in Section 1 of its Argument is material to the case at bar, and the decisions of the Court of Appeals and of the District Court are in no sense in conflict with any decision either of the United States Supreme Court, or of any Court of Appeals, or of any District Court.

VI. No Conflict Exists Concerning the Applicable Law between the Decisions Below and Any Established Precedents.

(a) The contention in the Petition that the work float was not an extension of the land is without materiality. It is material rather that the float was always tied to the pier, that from its narrow width and simple construction of four lashed timbers, it was completely unsuitable to navigation or ocean transportation, and suitable only for its actual use for standing while doing the pile driving work around the old piles under the pier. In each of the cases cited by the Petitioner at pages 13 and 14, the maritime activities were plain from the distance at sea at which the activities were occurring and by the nature of the activities. Thus in the case of *Spratley* v *Tidewater Construction Corporation*, 238 F. Supp. 650 (E.D. Va. 1965), the plaintiff was regularly employed on a barge which was traversing the open waters of Chesapeake Bay across a distance of some 20 miles. The vessel on which he was injured was described by the Court at page 650 as,

> "A barge of approximately 50 by 128 feet on which was mounted a derrick or crane.

A cogent indication of the maritime quality of the plaintiff's duties is found in the fact that at the time of his in-

juries the waters in which the vessel was then operating were so rough that the circumstances of his injury were described as follows on page 651:

> "Just as Spratley began to step down the roughness of the sea caused the barge and its crane to jerk the scaffold suddenly into the air whereupon Spratley lost his balance and fell . . ."

The plaintiff plainly encountered,

> "perils of navigation to which crafts used for transportation are exposed".

Evansville & Bowling Green Packet Co. v *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), 21.

In *Biggs* v *Norfolk Dredging Company*, 360 F2d 360, (4h Cir. 1965), the plaintiff not only

> "held a Coast Guard certificate as a seaman",

but there were

> "several barges ranged along the shipyard's dock",

together with a larger

> "derrick barge",

which the plaintiff was on board performing his work including the maneuvering of the various barges.

In the two remaining cases cited at page 14, the plaintiff in *Stanley* v *Guy Scroggins Construction Co.*, 297 F2d 374 (5th Cir. 1961), was working 40 miles out in the Gulf of Mexico and his injuries were caused "when a large wave threw him against an offshore oil drilling platform."

The plaintiff in *Stafford* v *Perini Corporatoin*, 475 F2d 507 (1st Cir. 1973) was on the deck of a large ocean going

scow working when it was some two miles from shore in the waters of Narragansett Bay.

In *Grimes* v *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), the plaintiff was 110 miles at sea attempting to transfer in a breeches buoy in rough weather from a rolling tugboat to a so-called Texas tower when the rough seas caused his injury.

The maritime activities of all of these plaintiffs in the cited cases are plainly apparent, but the activities of the plaintiff in the case at bar were those of a pile driver working under a pier pouring concrete around old pilings while he stood on a work float which served merely as a platform to perform that pile driving work. It was at all times tied to the pier, and was some four feet wide. There would plainly be no impact upon the uniformity of maritime law by the allocation of such a localized function to the local law of the land. It would be completely in accord with the views of the Supreme Court stated in the *Evansville & Bowling Green Packet Co.* v *Chero Cola Bottling Co.*, 271 U.S. 10 (1926) at page 22:

> "It was not practically capable of being used as a means of transportation. . . It performed no function that might not have been performed as well by an appropriate structure on the land or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed."

(b) The contention on page 15 of the Petition that admiralty jurisdiction in non-aviation cases "depends solely on the situs of the injury" is not well founded, and is plainly in conflict with the current views of the Supreme Court in *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249 (1972) at page 261, reading as follows:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

The significant phrase, "traditional maritime activities", was defined more fully earlier in the decision at pages 255 and 256 where the Court refers to,

> ". . . traditional maritime activities involving navigation or commerce on navigable waters."

and

> ". . . traditional forms of maritime commerce and navigation."

At page 256, footnote 6, the Supreme Court refers to the case of *McGuire* v *City of New York,* 192 F. Supp. 866, (S.D. N.Y. 1961). That Opinion of the District Court contains a scholarly review of the authorities which in turn also support the language of the United States Supreme Court which we have quoted. At page 871 of the *McGuire* case the Court therein states:

> "The touchstone has been whether the action, tort for example, was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce."

Further, on page 871, the *McGuire* case also contains the following comment:

"That the locality test was and continues to be a rule of exclusion or limitation is recognized by the Supreme Court."

The phrase, "rule of exclusion or limitation", indicates in effect that without the locality test, no jurisdiction exists, but with it no jurisdiction exists unless there is also,

"... traditional maritime activities, involving navigation or commerce on navigable waters." *Executive Jet Aviation, Inc.* v *City of Cleveland,* 409 U.S. 249 (1972) at page 256.

Thus, in *Victory Carriers* v *Law,* 404 U.S. 202 (1971), the land-based injury was clearly non-maritime and was excluded from maritime jurisdiction. In contrast, *Gutierrez* v *Waterman Steamship Corporation,* 10 L. Ed. 297 2d (1963), a land-based injury was included because it was caused by a maritime activity, namely the condition of the cargo carried to Ponce, Puerto Rico on the SS Hastings, then being discharged.

Victory Carriers v *Law,* 404 U.S. 202 (1971)
Gutierrez v *Waterman Steamship Corporation,* 10 L.Ed. 2d 297

In *Grant Smith-Porter Ship Co.* v *Rohde,* 257 U.S. 469 (1922), an uncompleted newly-constructed vessel was ruled to be therefore still a land-based activity and the traditional rule that a new vessel while still under construction is a non-maritime activity was followed.

The case of *Nacirema Operating Co., Inc.* v *Johnson,* 396 U.S. 212 (1969), reh. denied 397 U.S. 929 (1970), concerned a land-based injury and the ruling of the Court was equally consistent but turned more specifically on the language of the Federal Compensation Statute which was interpreted to exclude land-based activities.

In *Atlantic Transport Co.* v *Imbrovek*, 234 U.S. 52 (1913), The Supreme Court alluded to the maritime activity requirement and noted that it was in any event clearly satisfied since the plaintiff was working on a large packet steamship stowing its cargo for the international run between Hamburg, Germany and New York. The Petitioner at page 15 strangely cites the *Imbrovek* case for the contention that "the presence of a vessel is not required", although the packet steamer Pretoria, on which the plaintiff was stowing the cargo, was engaged in the Hamburg-America steamship run. The Petition on the same page 15 cites the cases of *McWilliams Dredging Co.* v *United States*, 105 F. Supp. 582 (E.D. La. 1952), and *The Hezekiam Baldwin*, 8 Ben. 556, 12 Fed. Cas. No. 6449, for the contention that no vessel is required. Yet in the *McWilliams* case the discharge line of a hydraulic dredge which extended completely across the harbor channel was struck by a departing ocean cargo vessel, and the scow in *The Hezekiam Baldwin* was large enough to carry grain-loading equipment throughout the harbor to cargo ships to load and unload their grain cargoes. The dredge and discharge line in the *McWilliams* case which so blocked the channel that the departing steamer struck it in mid-channel were clearly related to the traditional maritime activity of navigation in the same channel. The scow in *The Hezekiam Baldwin* was itself a vessel which moved about the harbor to the various places where it might be required for the purpose of transferring grain from one vessel to another. It not only carried grain cargoes across the harbor,

> "from one vessel to another",

but was itself,

> "subject to the same vicissitudes and perils of the seas to which all vessels are exposed". (page 15)

The Robert W. Parsons, 181 U.S. 17 (1903), concerned a large canal boat which carried cargo between Lake Erie and New York Harbor, and then travelled across the Harbor or the Lake to its destination.

Each of these cases readily meet the jurisdictional standards currently set forth in *Executive Jet Aviation* v *City of Cleveland,* 409 U.S. 249 (1972), at page 256, of

> "... traditional maritime activities involving navigation or commerce on navigable waters".

The total absence of these requirements in the case at bar in which a self-styled pile driver was pouring concrete into forms under a pier while standing on a float, four feet wide, always tied to the pier is plain, and the rulings of the District Court and the Court of Appeals were proper.

(c) After citing a number of cases previously cited in the Petition, the Petitioner at page 18 cites the case of *Hess* v *United States,* 361 U.S. 314 (1960). In that case, the plaintiff was working on board a tug and barge in the Columbia River when the tug and barge struck a pier, causing the tug and barge to founder and capsize in the turbulent waters from the spillway of the dam. The flotilla was operating in a navigable river and was clearly engaged in a maritime activity. Indeed, the Court of Appeals Opinion, 259 F2d 285 (9th Cir. 1958), in its comment at footnote 4, at page 289, states:

> "But here it cannot be doubted that the activities in which the decedent was engaged had a direct relation to navigation and commerce."

The decisions in the Courts below are therefore wholly in accord with all applicable precedents and preserve the uniformity reflected in those precedents.

Petitioner also seeks to rely upon the testimony of so-called experts to which reference is made at page 17 of the Petition. The testimony of the proposed expert, Willard Appley, was not material to the issues and was properly excluded by the Trial Court. In describing his experience with vessels, Mr. Appley referred to the operation of a tugboat, and towage of deck scows, lighters and barges. In his cross-examination under voir dire (R.A. 332) he admitted that the barges were from 175 to 225 feet by about 40 feet beam. There was no lighter, scow, tug, or barge in use at any time during the performance of the job at Pier 3 from the commencement of that job in August, 1967, until the date of the plaintiff's injury in October, 1967. The proffered testimony by Willard Appley was properly excluded by the Court and the Court reasonably exercised its sound discretion thereby.

> "It is a well established rule of evidence that circumstances under which other comparable conduct occurs should be substantially similar. Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 459, 460; Chesapeake & O. Ry. Co. v. Thomason, 6 Cir., 70 F.2d 860; People v. Gotshall, 123 Mich. 474, 479, 82 N.W. 274; Trask v. Boston & Maine R.R., 219 Mass. 410, 415, 106 N.E. 1022."
>
> *Detroit, T & I R Co.* v *Banning,* 173 F2d 752, 756

The other purported expert, Ward, was a co-worker of the plaintiff who was standing near him. He did not purport to contradict the plaintiff's own testimony that the raft was some three and one-half to four feet wide, and his testimony to that effect (R.A. 304, 305) is quoted herein at page 4. Nor did he purport to contradict the plaintiff's

own testimony that the raft was tied to the pier at all times and was merely used under the pier to repair the piles. Any reference in the petition to movement of the raft,

> "over navigable waters",

necessarily is prescribed by the specific testimony that the movement would be some 10, 15 or 20 feet depending upon the location of the piles to be worked on that morning as laid out by the foreman of the job. Plainly, these specifics are consistent with the local quality of the work being performed, and are inconsistent with,

> "... traditional maritime activites, involving navigation and commerce."
>
> *Executive Jet Aviation, Inc.* v *City of Cleveland*, 409 U.S. 249, page 256

It is of some interest that the section of the Petition commencing on page 13 and ending on page 20 is the verbatim text of the Petitioner's earlier Motion for Rehearing already filed and already ruled on by the Court of Appeals. The two "hypothetical" situations on page 19 have already been evaluated by the Court of Appeals as reaching,

> "distorted results not dictated by anything said or implied in our opinion."

The assumptions contained in each hypothetical are completely unrelated to the actual facts of the case. In the first, if the seaman were a crewmember of a vessel arriving at a harbor, that status would be obviously a basis for his action and there is nothing in the Opinion of April 8, 1973 which would contravene it. The second hypothetical is so abstruse as to be unclear in its presentation. Moreover, there are numerous assumptions which are not only un-

supported by, but in conflict with, the facts presented by the present plaintiff. There is nothing in either hypothetical which is material to or affected by the Opinion of the Court of Appeals of April 9, 1973.

VII. No Ground for the Considerations Cited by Rule 19 is Presented.

The issues in the present case have been thoroughly considered in a complete Opinion of the District Court, and in two further adjudications by the Court of Appeals for the First Circuit in the initial Appeal and in the Motion for Rehearing. But, in addition the plaintiff also has testified in a formal Hearing before the Bureau of Employee's Compensation, as a result of which he secured an adjudication by the Deputy Commissioner that he was within the coverage of the Longshoremen's and Harbor Workers' Act. By virtue of the express terms of that Statute he could not be within its terms and at the same time qualify as a seaman and member of the crew of a vessel. Although there are cases where a plaintiff has proceeded sequentially, first in the Compensation Forum, and next in the Judicial Forum, there is no case in which the plaintiff has testified to opposite effect in both of these fora in parallel. The present plaintiff not only filed his Complaint in this action alleging that he was,

> "a seaman and member of the crew of a lighter,"

(there being no such lighter), but three months after he had filed this suit he testified under oath before the Compensation Commissioner that he was a pile driver and in the presence of his counsel sought and secured the benefits of a Statute whose terms were preemptive of his purported status of a seaman. There have in all, therefore, been some

four adjudications which have preceded the present Petition. The first being adjudication before the Federal Compensation Commissioner, the second being that of the District Court, the third and fourth being that of the Court of Appeals on the formal Appeal and the Motion for Rehearing. These considerations point additionally to the unreasonableness of the present Petition, and the appropriateness of its denial.

Conclusion.

The Petition fails to cite a single decision by any Court at any level which is in any degree in conflict. The Petition does not present any basis for meeting the considerations governing the review on certiorari provided by Rule 19 of the Supreme Court. The Respondent, McKie Lighter Co., Inc., respectfully submits that the Petition should properly be denied. The Respondent, Bethlehem Steel Corporation, respectfully submits that the Petition should be denied.

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